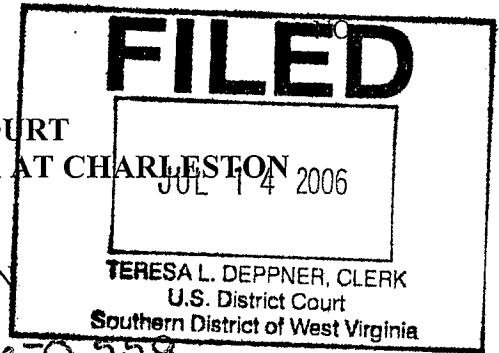


IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON



WEST VIRGINIA TRUCK AND TRAILER
CO.,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF
LABOR, OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,

Defendant.

CIVIL ACTION

NO.: 2:06-CV-00559

#18818

COMPLAINT

AND NOW, comes the Plaintiff, West Virginia Truck and Trailer Co., by and through its counsel, Dapper, Baldasare, Benson, Behling & Kane, P.C., and files the following Complaint, averring as follows:

1. West Virginia Truck and Trailer is a West Virginia corporation with a business address of 1 Jain Drive, Cross Lanes, West Virginia 25313.

2. Defendants, the United States Department of Labor, Occupational Safety and Health Administration, are agencies of the United States government as defined under the Freedom Of Information Act, as amended, 5 U.S.C. §552 (hereinafter "FOIA") and maintain a business office at 405 Capitol Street, Suite 407, Charleston, West Virginia 25301.

3. This court has jurisdiction of this action pursuant to the Freedom of Information Act, as amended, 5 U.S.C. §552(a)(4)(B); and the Administrative Procedure Act, 5 U.S.C.A. §§701 et. seq.

4. This action is brought pursuant to the FOIA to require public disclosure of all unredacted reports, records, video recordings and other materials contained in the investigative files of the Occupational Safety and Health Administration (hereinafter "OSHA") generated as a result of the incident occurring on April 8, 2003 at 1 Jain Street, Cross Lanes, West Virginia and assigned OSHA inspection #116525288.

5. The subject incident is alleged to have resulted in a fall and injuries to Kevin Daniels at the above location.

6. OSHA was immediately notified of the incident and dispatched an inspector to the site who secured video recordings of the site as well as video recordings of interviews of witnesses.

7. Subsequently, Kevin and Sherry Daniels initiated litigation against West Virginia Truck and Trailer and Roger Hess t/d/b/a Hess Construction in the Kanawha County Court of Common Pleas captioned at No. 05-C-419 to recover for injuries allegedly sustained as a result of the April 8, 2003 incident.

8. Mr. Daniels' employment status at the time of the subject incident is a potentially dispositive factor in the underlying litigation.

9. In the course of its investigation and pursuant to the FOIA, 5 U.S.C.A. §552(a), West Virginia Truck and Trailer, by and through its counsel, sought to obtain, by letter dated April 4, 2006, copies of the investigative documents as well as copies of the video recordings made by OSHA. A copy of West Virginia Truck and Trailer's April 4, 2006 request is attached as Exhibit "A" to this Complaint and incorporated herein by referenced.

10. In response, Defendant, OSHA, by through its agent, Stanley Elliot, in a letter dated May 12, 2006 provided portions of its file materials and notified West Virginia Truck and

Trailer that it had withheld and/or redacted certain portions of the requested information. A copy of Mr. Elliot's letter is attached hereto as Exhibit "B" and incorporated herein by referenced.

11. The documents and video recordings provided to West Virginia Truck and Trailer had been significantly redacted.

12. Although OSHA has provided some video recordings to counsel for West Virginia Truck and Trailer in response to its request under FOIA, significant portions of the tape have been redacted and, as a result, Plaintiff is unable to identify necessary information.

13. OSHA, and Stanley Elliott, its agent, provided no applicable exemption for the redactions contained to the videotaped interviews.

14. Pursuant to the appeal provisions of the FOIA, counsel for West Virginia Truck and Trailer appealed OSHA's determination by letter dated May 31, 2006 addressed to the Solicitor of Labor, United States Department of Labor. A true and correct copy of counsel's letter is attached hereto as Exhibit "C" and incorporated herein by reference.

15. The Solicitor of the Department of Labor and the Department of Labor did not make a determination with respect to the appeal within the time prescribed by 5 U.S.C. §552(a)(6)(B)(i); and therefore, pursuant to 5 U.S.C. §552(a)(6)(C)(i) plaintiff has exhausted its administrative remedies.

16. Depositions of individuals involved in the aforementioned civil case, and specifically the deposition of Roger Hess of Hess Construction, have elicited testimony that is inconsistent with OSHA's findings with respect to Mr. Daniel's employer on the date of the accident.

17. Mr. Hess contends that Mr. Daniels was not his employee at the time of the subject incident.

18. A review of the OSHA investigation report notes that Hess conceded that he exercised control over the workers who were present at the time of the accident, ostensibly including Mr. Daniels.

19. A review of the citations by OSHA reveals that the citations relative to Mr. Hess and Hess Construction Company focus primarily on issues related to the actions or inactions of Hess Construction surrounding Daniels' fall, i.e. improper training and improper supervision of Daniels which suggests that during its investigation OSHA had a basis for determining Mr. Daniels to be an employee of Roger Hess and/or Hess Construction Company, rather than West Virginia Truck and Trailer.

20. The issue of Mr. Daniels' employment status is potentially dispositive of the aforementioned litigation; therefore, any witness accounts or discussions of Mr. Hess immediately following the incident are needed in order to ensure that the litigation be decided on its merits.

21. The trial of the underlying civil action filed by Daniels is set for August 21, 2006 before Judge Bloom in the Circuit Court of Kanawha County, West Virginia.

22. Plaintiff has exhausted its administrative remedies with respect to the FOIA request for OSHA/Department of Labor records.

23. Plaintiff has no other method by which to obtain the requested information before trial.

24. Plaintiff has a statutory right to access to the documents in question.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter a judgment in its favor and against the Defendant declaring that Defendant's refusal to disclose the documents and videotaped interviews is unlawful in ordering OSHA and/or the Department of

Labor to produce all videotaped interviews contained in its investigative file; and to grant such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

DAPPER, BALDASARE, BENSON,
BEHLING & KANE, P.C.



Robert E. Dapper, Jr.
WV ID No. 170

Brian S. Kane
WV ID No. 6443

Four Gateway Center, 10th Floor
444 Liberty Avenue
Pittsburgh, PA 15222-1225
(412) 456-5555

*(Counsel for Plaintiff,
West Virginia Truck and Trailer, Co.)*

EXHIBIT A



■ Dapper, Baldasare, Benson, Behling & Kane, P.C. ■

Bryson F. Datt, Jr.
bdatt@d3bk.com

DIRECT DIAL: (412) 697-4654
Please Refer To: 2-61344

April 4, 2006

VIA FACSIMILE TO 215-861-4904
AND CERTIFIED MAIL

Occupational Safety and Health Administration
Attention: FOIA Coordinator
The Curtis Center – Suite 740 West
170 South Independence Mall West
Philadelphia, PA 19106-3309

Re: Freedom of Information Act (FOIA) Request

West Virginia Truck and Trailer Company
Department of Labor, OSHA Inspection Number: 116525288
Inspection Cite: 1 Jain Street, Cross Lanes, WV 25313
Inspection Dates: 04/09/2003 – 04/28/2003

To Whom It May Concern:

Our firm represents West Virginia Truck and Trailer Company with regard to a lawsuit filed on behalf of Kevin and Sherrie Daniels relative to injuries sustained in an April 8, 2003 accident.

The Occupational Safety and Health Administration, in conjunction with several West Virginia state agencies, conducted an investigation concerning the subject incident. I am writing to formally request – pursuant to the Freedom of Information Act (FOIA) – the production of any and all materials contained in the Occupational Safety and Health Administration file stemming from the investigation of the April 8, 2003 incident at 1 Jain Street, Cross Lanes, West Virginia. Specifically, I would like to request an unredacted video tape of the interview with the general manager of our client, Mike Mostetler, as well as unredacted transcripts of the interviews with fact witnesses conducted by OSHA.

Occupational Safety and Health Administration

Attention: FOIA Coordinator

April 4, 2006

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Thank you for your attention hereto. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "BFDatt", with a horizontal line extending from the end of the signature.

Bryson F. Datt, Jr.

BFD/njr

EXHIBIT B

U.S. Department of Labor

Occupational Safety and Health Administration
 405 Capitol Street – Suite 407
 Charleston, WV 25301
 Telephone: 304/347-5937
 Fax: 304/347-5275



May 12, 2006

Dapper, Baldasare, Benson, Behling & Kane, PC
 Attn: Bryson F. Datt, Jr. Esquire
 Four Gateway Center, 10th Floor
 444 Liberty Avenue
 Pittsburgh, PA 15222-1225

Dear Mr Datt:

This is in response to your Freedom of Information Act request concerning OSHA's investigation of West Virginia Truck and Trailer Company. Enclosed are the records you requested. Deletions have been made to protect information exempt from public disclosure as prescribed by the Freedom of Information Act (Title 5, United States Code, Section 552). Where deletions were made, the appropriate FOIA exemptions are indicated, and for your convenience, a general description of these exemptions is enclosed.

You have the right to appeal any of the deletions made. Please direct your appeal to the Solicitor of Labor within 90 days from receipt of this letter. It should state in writing the grounds for appealing as well as any supporting statements or arguments. To facilitate processing, please include a copy of your initial request and the response you received. Send your appeal to: The Solicitor of Labor, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, DC 20210. Both the envelope and your letter of appeal should be clearly marked FOIA Appeal.

The Freedom of Information Act allows the government to charge for the costs involved in providing these records. The FOIA fees incurred for your request are:


Administrative Search (\$5 per quarter hour)	
Professional Search (\$10 per quarter hour)	
Review Time (\$10 per quarter hour)	\$ 20.00
Copying Costs (\$0.15 per page)	\$ 17.85
Videotapes/Photographs (actual costs)	\$ 10.50
Mailing (in excess of \$1.00)	\$ 4.00
TOTAL AMOUNT DUE	\$ 52.35

Please send your check or money order, payable to the U.S. Department of Labor - OSHA, to this office for the total amount due.

OSHA maintains an Internet website at www.osha.gov which is open to the public. The Internet site provides easy access to our agency's database which offers general information on companies inspected, violations cited and fines assessed. Also available is the latest information on OSHA's regulations, policies and publications.

If you have any questions regarding the enclosed records, please contact this office at (304) 347-5937 and fax (304) 347-5275.

Sincerely,


Stanley Elliott
Area Director

Enclosure

EXPLANATION OF FOIA EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATE CODE, SECTION 552

- (1) Classified records on national defense or foreign policy.
- (2) The internal personnel rules and practices of an agency.
- (3) Records specifically exempted from disclosure by another statute.
- (4) Trade secrets and commercial or financial information obtained from a person and which are privileged or confidential.
- (5) Inter-agency or intra-agency memorandums or letters only available by law to a party in litigation with the agency.
- (6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- (7) Protects law enforcement records or information if disclosure:
 - (A) could reasonably be expected to interfere with enforcement proceedings;
 - (B) would deprive a person of a right to a fair trial or an impartial adjudication;
 - (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;
 - (D) could reasonably be expected to disclose the identity of a confidential source;
 - (E) would disclose techniques and procedures for law enforcement investigations or prosecutions;
 - (F) could reasonably be expected to endanger the life or physical safety of an individual.
- (8) Records relating to the regulation or supervision of financial institutions.
- (9) Geological and geophysical information and data concerning wells.

EXHIBIT C



☐ Dapper, Baldasare, Benson, Behling & Kane, P.C. ☐

Brian S. Kane
bkane@d3bk.com
Bryson F. Datt, Jr.
bdatt@d3bk.com

DIRECT DIAL: (412) 697-4643

DIRECT DIAL: (412) 697-4654
Please Refer To: 2-61344

May 31, 2006

Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

RE: FOIA Appeal

To Whom It May Concern:

Please accept this letter as an appeal from the determination of the Occupational Safety and Health Administration with regard to the FOIA request filed on behalf of West Virginia Truck and Trailer Company for information concerning Department of Labor, OSHA inspection #116525288. I have enclosed a copy of my initial request as well as a copy of the response of Mr. Stanley Elliott, the Area Director for OSHA in Charleston, West Virginia.

Specifically, I am appealing the deletions made to the videotaped interviews conducted on behalf of OSHA with regard to the above OSHA inspection number. Our office is willing to pay all reasonable costs involved in providing the unredacted videotape or transcripts of the same.

The decision of Mr. Elliott with respect to the videotaped interviews does not cite any appropriate FOIA exemption setting forth the basis for OSHA failing to provide the videotaped interviews in their entirety. In analyzing the explanation of FOIA exemptions contained in 5 U.S.C. §552, it does not appear that any exemption could apply to exempt the unredacted videotaped interviews or unredacted transcripts of the videotaped interviews from production to our office under the Freedom of Information Act.

Exemptions 1 through 6, 8 and 9 contain no basis for exempting the interviews from production because the videotaped interviews do not constitute records on national defense or foreign policy, internal personnel rules and practices of an agency, records specifically exempted from disclosure by another statute, trade secrets and commercial or financial information, and inter-agency or intra-agency memorandum or letter, a personnel or medical file, records relating

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May 31, 2006
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to the regulation or supervision of financial institutions, or geological and geophysical information and data concerning wells.

5 U.S.C. §552(7)(a-b & d-f) similarly do not provide a valid basis for exempting exemptions from FOIA because producing videotaped interviews obtained during an OSHA investigation would not interfere with enforcement proceedings as those proceedings have been completed, would not deprive any person of a right to fair trial or an impartial adjudication, would not be expected to disclose the identity of a confidential source, would not disclose techniques and procedures for law enforcement investigations or prosecutions, and could not reasonably be expected to endanger the life or physical safety of an individual.

Therefore, 5 U.S.C. §552(7)(C) is the only possible basis for exempting the material from Freedom of Information Act disclosure. 5 U.S.C. §552(7)(C) exempts information if it constitutes an unwarranted invasion of personal privacy. Interviews of witnesses regarding the subject of workplace safety or the circumstances surrounding an alleged incident do not constitute issues involving personal privacy. To the contrary, issues regarding workplace safety or circumstances surrounding an alleged incident involve circumstances and events that occurred in public. The disclosure of such interviews could not reasonably be expected to constitute an unwarranted invasion of personal privacy and as such the requested materials should be provided.

For the above reasons, I submit this appeal from OSHA's decision dated May 12, 2006 and signed by Stanley Elliott. I ask that the Department of Labor provide to my office the unredacted videotaped interviews or unredacted transcripts of those interviews in accordance with the Freedom of Information Act. Should you have any questions or comments regarding this appeal, or if you require further information in order to reach a determination regarding this appeal, please do not hesitate to contact me. I look forward to working with you throughout the appeal process. Thank you very much.

Very truly yours,



Brian S. Kane
Bryson F. Datt, Jr.

BSK/BFD/njr

Enclosures